81-2112

No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD PETERS, ROBERT T. SIMPSON, JR., WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES, LOCAL 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Petitioners,

vs.

HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Question Presented

Whether a state court's refusal to enforce a valid, pre-existing collective bargaining agreement based upon the court's application of a new state law constitutes an impairment of the obligation of the contract within the meaning of Article I, Section 10, Clause 1 of the Constitution of the United States?

Parties In The Supreme Court of Illinois

The parties in the Supreme Court of Illinois were Donald Peters, et al (petitioners in this Court)* and Health and Hospitals Governing Commission of Cook County (Respondent in this Court).

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* In addition, the following parties are also petitioners in this Court and were parties in the Supreme Court of Illinois:

Robert T. Simpson, Jr., Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743, I.B.T.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

DONALD PETERS, ROBERT T. SIMPSON, JR., WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES, LOCAL 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Petitioners,

vs.

HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Donald Peters, et al., pray that a writ of certiorari issue to review the decision of the Supreme Court of Illinois entered on December 18, 1981, insofar as it refused to enforce a valid public employee collective bargaining agreement. The Supreme Court of Illinois denied petitioner's Petition For Rehearing on January 29, 1982.

Opinions Below

The opinion of the Illinois Supreme Court is reported at 88 Ill.2d 316, 430 N.E.2d 1128 and reprinted at App. A. The opinion of the Illinois Appellate Court is reported at 91 Ill. App. 3d 1104, 415 N.E.2d 653 and reprinted at App. B. The order of the Circuit Court of Cook County is unpublished and reprinted at App. C.

Jurisdiction

The Illinois Supreme Court on December 18, 1981 applied a new state law to a valid, pre-existing public employee collective bargaining agreement and refused to enforce the agreement. A petition for rehearing was denied on January 29, 1982. On application of petitioners, Justice Stevens extended the time for filing a petition for a writ of certiorari to May 13, 1982. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

Provisions Involved

Article I, Section 10, Clause 1 of the United States Constitution provides in pertinent part as follows:

> No state shall . . . pass any . . . Law impairing the obligation of contracts . . .

The Illinois County Hospitals Act, Pub. Act 81-1197, *Ill. Rev. Stat.* ch. 34 §5020, provides in pertinent part:

> The Board of Commissioners (Cook County) shall have and exercise all rights, powers and duties heretofore exercised by the Commission. (Health and Hospitals Governing Commission of Cook County). All books, records, papers, documents, property, real and personal unexpended appropriations and pending business in any way pertaining to the rights, powers and duties of the Commission shall be trans-

> ferred and delivered to the Board of Commissioners. All rights, duties and obligations of the Commission shall become the rights, duties and obligations of the Board of Commissioners.

The Health and Hospitals Governing Commission Act, Pub. Act 76-32, which was amended in part and repealed in part by the County Hospitals Act, *supra*, provided in pertinent part at Section 10:

> The Commission, (hospital commission) as agent to the county in which the Commission exists and without further authorization from that county or the Board of Commissioners thereof, shall have and exercise on behalf of that county, the following powers: . . . to establish and enforce policies regarding the use, operation and management of hospitals and health facilities under its authority; . . . to make and enter into contracts to accomplish any or all of its purposes ; . . . .
>
> As agent for the county, the Commission shall fix all salaries, wages or other compensation, or benefits and working conditions of all employees, including physicians, or other persons performing services for the Commission.

Statement Of The Case

In 1971, Petitioner, Local 743, IB of T (hereinafter the Union), and Health and Hospitals Governing Commission of Cook County, Respondent (hereinafter the hospital commission), pursuant to an enabling statute and appropriate case law entered into a valid election agreement allowing employees to vote upon exclusive collective bargaining representation and subsequent negotiation of

a collective bargaining agreement.[1] Such an agreement was needed, because Illinois public employees, unlike those in a majority of the states, do not have statutory rights to file union representation election petitions and engage in collective bargaining.[2] The election agreement covered the security guards at Cook County Hospital.

Under the election agreement, if the union established by an election that it represented a majority of the employees in the bargaining unit, the hospital commission agreed to bargain in good faith concerning the employees' wages, hours and working conditions. In exchange for this agreement to bargain in good faith, the union agreed not to strike during the term of any collective bargaining agreement or pending the resolution of collective bargaining disputes. If the parties could not agree upon a collective bargaining agreement after a reasonable period of negotiations, either could refer unresolved matters to a fact finder to make nonbinding recommendations to re-

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[1] *Health and Hospitals Governing Commission Act*, Public Act 76-32, effective July 1, 1969; *Tobin* v. *Health and Hospitals Governing Commission of Cook County*, 66 Ill. App.3d 564, 384 N.E.2d 77 (1978); *Classroom Teachers Association* v. *Board of Education of United Township High School Distric No. 30, East Moline, Illinois*, 15 Ill. App.3d 224, 304 N.E.2d 516 (1973); *Chicago Division of Illinois Education Association* v. *Board of Education of City of Chicago*, 76 Ill. App.2d 456, 222 N.E.2d 243 (1966);

[2] See appendix E for a list of those states which have provided statutory collective bargaining to public employees. In 1981, the Illinois legislature gave school district employees a right to file representation election petitions with the regional superintendent of schools, but did not compel collective bargaining if the unions won the elections. Pub. Act 82-107; Ill. Rev. Stat. ch. 122 §§13-14.24, 10-22.4(a) and 10-22.40(a).

solve the differences. The primary obligations of the agreement to bargain in good faith and refrain from economic action terminate upon the occurrence of either of two events: the failure of the parties to comply with an arbitration award or the loss of the union's majority status. The hospital commission may initiate a decertification election if it believes on the basis of objective[3] evidence that the union no longer represents a majority of the employees.

These principles of exclusive representation, bargaining in good faith, resolution of negotiation disputes and termination of the collective bargaining relationship upon the union's decertification are firmly rooted in the tradition of American labor relations as established in the National Labor Relations Act, as amended, and comprehensive public employee collective bargaining laws passed by various states.[4]

In an election conducted in 1971 under the election agreement, a majority of the hospital's guards selected the union to represent them for the purpose of collective bargaining; between 1971 and 1980 three (3) consecutive 3-year collective bargaining agreements were negotiated peacefully and without strike between the parties. These agreements as distinguished from the ground rules of the election agreements provided for the wages, hours and working conditions of the security guards.

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[3] The decertification election procedure is patterned on the model created by the National Labor Relations Act, as amended, 29 U.S.C. §159; *Brooks* v. *NLRB*, 348 U.S. 96 (1954); *NLRB* v. *Gallaro*, 419 F.2d 97, 100 (2d Cir. 1969)

[4] 29 U.S.C. §151, et. seq.; Bok and Dunlop, *Labor and the American Community*, 207-28 (1970); Wellington and Winter, *The Unions and the Cities*, 83-96 (1971); See also App. E.

In November, 1979, the Illinois General Assembly passed the County Hospital's Act, Public Act 81-1197, Ill. Rev. Stat. ch. 34 §5011, et. seq., which amended in part and repealed in part the County Hospital's Governing Commission Act. The new law dissolved the Health and Hospitals Governing Commission of Cook County and transferred to the Cook County Board of Commissioners the statutory responsibility to operate the largest public hospitals in the midwest (Cook County and Oak Forest Hospitals located in Chicago and nearby Oak Forest, Illinois) providing health care to the indigent. The new statute gives the Cook County Board authority to determine compensation, benefits and working conditions of the hospital employees. Under the former County Hospital's Government Commission Act, the hospital commission had statutory responsibility to operate the hospitals, appoint staff, determine compensation, benefits and working conditions, and enter into contracts.

Shortly after this new law passed and upon expiration of the third consecutive collective bargaining agreement between the hospital commission and the Union, the Board of Commissioners of Cook County terminated without reason the collective bargaining election agreement and declined to recognize the Union for future purposes of collective bargaining.[5]

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[5] In the Illinois Supreme Court, one other union, Hospital Employees Labor Program of Metropolitan Chicago (H.E.L.P!) which represents other employees at Oak Forest and Cook County Hospitals, along with petitioner, Local 743, I.B. of T, prosecuted consolidated cases concerning the County Board of Commissioners' termination of their respective collective bargaining election

The Union's complaint to enforce the collective bargaining election agreement was dismissed by the Circuit Court of Cook County. The Appellate Court of Illinois reversed and found the collective bargaining election agreement was not terminable at will and was an enforceable obligation which transferred to the Board of Commissioners of Cook County pursuant to the County Hospitals Act. Although the federal constitutional question of impairment of contracts was raised in the petitioners' brief to the Appellate Court of Illinois, the court did not consider it. The court wrote: "The remaining arguments relative to constitutional prohibitions against impairment of contracts need not be considered in view of the result mandated by the foregoing discussion." 91 Ill. App.3d at 1111, 415 N.E.2d at 658.

The state supreme court reversed the appellate court's decision and declined to enforce the election agreement. It stated the issue without specifically referring to petitioners' federal constitutional impairment assertion:

> The narrow question presented is whether, because section 10 of the County Hospitals Act provides that the duties and obligations of the Commission shall become the duties and obligations of the Board, the defendants (Respondent) can be required to negotiate in accordance with the prayer of the complaints. 88 Ill. 2d at 318, 430 N.E.2d at 1130.

The court interpreted the County Hospitals Act as precluding it from ordering the County Board to recognize

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[5] (Continued)
agreements. However, while the case was pending in the Illinois Supreme Court, the Board of Commissioners entered into collective bargaining negotiations with this other union which has chosen not to join in the petition for a writ of certiorari.

and bargain with the union, thereby impairing the contractual obligations.

The Questions Are Substantial

The questions presented by this petition are substantial, and they warrant the attention of this Court. They are:

1. The impairmant of a public employee collective bargaining contract is an issue of federal constitutional law not yet decided by this court.

2. Because collective bargaining in states without comprehensive public sector collective bargaining laws, such as Illinois, is based solely upon voluntary agreements between the employers and employee representatives, the Illinois Supreme Court's decision undermines the very heart of such public sector labor relations.

3. The Illinois Supreme Court's application of the new statute impairs the collective bargaining election agreement and contravenes controlling constitutional principles decided by this court.

Issue of Federal Constitutional Law Not Yet Decided By This Court

This Court has never decided whether a state can impair a collective bargaining agreement by declining to enforce a valid commitment to recognize and bargain with a public employees' representative. It has, however, considered contract claims of public employees whose employment contracts have been impaired by subsequent state law. *Indiana, ex rel., Anderson* v. *Brand*, 303 U.S. 95 (1938); *Hall* v. *Wisconsin*, 103 U.S. 5 (1880). In *Brand*, a township school teacher's contract created by a state tenure act was impaired by a subsequent

statute which removed tenure protection from township school teachers. This Court reversed the state supreme court's decision upholding the statute. The Court has, therefore, applied the contract clause to individual public employee contracts with public employers. *A fortiorari*, the contract clause also applies to collective agreements with public employers covering their employees.

Collective bargaining among states and local governments and their employees has increased substantially within the past twenty (20) years.[6] The relationship between contract clause constitutional principles and public employee collective bargaining agreements is presented by this petition and warrants this Court's attention.

The Effect Of The Court's Decision Is To Destroy Public Sector Collective Bargaining

The union and hospital commission created a system of exclusive representation based upon fundamental principles of American collective bargaining established in the representation section of the National Labor Relations Act, 28 U.S.C. §159. In Illinois public employers have created work place democracy and public employee representation by conducting representation elections and engaging in collective bargaining in the absence of a comprehensive collective bargaining statute.[7] Recognition or election agreements similar to the one involved in this case are used to achieve these goals.

The Illinois Supreme Court has refused to provide any contract remedy by applying the County Hospital's

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[6] *See*, generally, *Wellington* and *Winter*, *supra*, n. 4.

[7] *See* cases cited at n. *1*, supra.

Act. The decision has destroyed a fair and harmonious system of public employee bargaining that has existed for ten years. This result deprives the union and employees of their contractual property rights and proper expectation for contract enforcement under the Illinois law allowing collective bargaining in the absence of the statute.

The Contract Clause Protects Employee Rights Created By Contract

This Court has jurisdiction to review the Illinois Supreme Court's decision because the County Hospital's Act has been applied in a manner that impairs the collective bargaining election agreement. *Georgia Railway and Power Co.* v. *Decatur*, 262 U.S. 432, 439 (1923); *Columbia Railway, Gas and Electric Co.* v. *South Carolina*, 261 U.S. 236, 244-45 (1923); *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 246-48 (1916); *Louisiana Railway and Navigation Co.* v. *Behrman*, 235 U.S. 164, 170-71 (1914); *Louisiana ex rel. Hubert* v. *Mayor of New Orleans*, 215 U.S. 170 (1909). By holding that the Cook County Board of Commissioners pursuant to the County Hospitals Act, has the authority to determine without consultation and discussion with the union, compensation, benefits and working conditions of the security guards, the Illinois Supreme Court has declined to enforce an agreement providing for employee representation and mutual discussions concerning compensation, benefits and working conditions. Under the court's opinion, the transference of governing power from the hospital's commission to the Cook County Board renders unenforceable the election agreement notwithstanding the terms of the County Hospital's Act preserving all existing obligations.

A state court's interpretation of a subsequently enacted statute and impairment of a pre-existing contract is constitutionally infirm as a violation of Article I, Section 10, Clause I of the Constitution of the United States. *Columbia Railway, Gas and Electric Co.* v. *South Carolina, supra; Detroit United Railway* v. *Michigan, supra.* In *Detroit United Railway,* this Court wrote:

> . . . [t]he jurisdiction of this court does not depend upon the form to which the legislative action is expressed, but rather its practical effect in operation as construed and applied by the state court of last resort, and this, irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is based upon the subsequent legislation. 242 U.S. at 247.

The specific legislative enactment does not have to refer to the contract which has been effectively impaired by the state court's decision. In *Georgia Railway and Power Co.* v. *Decatur, supra,* a state statute which did not refer to a contract setting transit rates was held to impair the obligation of the contract. The statute extended the corporate limits of the town and was construed by the state supreme court as having the effect of rendering applicable to the additional territory maximum street and railway rates affixed by the earlier contract. Even though the statute did not specifically refer to the contract or in terms make the strict railway rates applicable to the annexed territory, the necessary result of the state court decision was to give it that effect. Therefore, the statute substantially impaired the obligation of the contract. Even though the County Hospital's Act does not specifically refer to the collective bargaining agreement, the application of it by the Illinois Supreme Court acts as an impairment in violation of the contract clause.

Section 10 of the County Hospital's Act is a broad statement transferring authority, rights and obligations from the hospital commission to the Cook County Board. Its predecessor specified the duties and powers of the hospital commission, including the authority to fix salaries, wages or other compensation and to enter into contracts to accomplish any or all of its purposes. The Illinois Appellate Court held this new section to obligate the Board of Commissioners to honor the collective bargaining election agreement. However, the Illinois Supreme Court held the Board of Commissioners could not be required to bargain pursuant to the election agreement and new statute.

The election agreement is valid, and the parties had authority to enter into it under Illinois case and statutory law.[8] The Illinois Appellate Court analyzed the election agreement and held it is not a perpetual contract because it has two ascertainable termination points —the union's decertification and either party's refusal to honor an arbitration award. The Illinois Supreme Court did not overrule this finding. It merely stated that even

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[8] The hospital commission had statutory authority to "... fix all salaries, wages or other compensation, or benefits and working conditions of all employees . . ." and "*. . . to make and enter into contracts to accomplish any or all of its purposes. . . .*" *emphasis added.* Health and Hospitals Governing Commission Act, Pub. Act 76-32; amended by Pub. Acts 76-2015 and 78-925; *Tobin v. Health and Hospitals Governing Commission, supra,* n. 1. This statutory language was replaced by the broad language of Section 10 of the County Hospital's Act. Ill. Rev. Stat. ch. 34 §5020.

if the election agreement has defined termination points, it is, nevertheless, unenforceable. Thus, the court did not hold the contract could be terminated at will, or that it is an invalid contract of perpetual duration.

The court's refusal to enforce the election agreement constitutes an impairment, because the obligation of the contract also includes appropriate remedy. Early contract clause litigation recognized that a subsequent state law affecting the remedy of a contract so substantially as to impair and lessen its value is forbidden by the contract clause. *Edwards* v. *Kearcey,* 96 U.S. 595 (1877). The union has been deprived of a remedy which it legitimately expected at the time the contract was made. Absolute refusal to enforce is not the same as modification of remedy during a clear economic emergency. Cf. *Home Building & Loan Assoc.* v. *Blaisdell,* 290 U.S. 398 (1934). The Illinois Supreme Court's decision forecloses petitioner from pursuing its contract remedies.

This impairment is not constitutional, because it is an unreasonable and unnecessary total destruction of a valid contract. Impairments might be valid if they are reasonable and necessary to serve an important public purpose or merely modify a remedy during an economic emergency. *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234 (1978); *United States Trust Company* v. *New Jersey,* 431 U.S. 1 (1977); *Home Building and Loan Assoc.* v. *Blaisdell, supra.* Although the Illinois Supreme Court did not specify the public purpose it sought to serve, it unreasonably intimated that the election agreement and its bargaining requirement surrender the employer's discretion to establish the terms of employment. To the contrary, the election agreement itself and well recognized principles of collective bargaining adequately protect the

employer's discretion. The court's absolute refusal to enforce was unnecessary because the agreement or judicial recognition of the agreement's own limitations on bargaining could have adequately safeguarded the Court's concern.

The court obviously ignored the unmistakable language of the election agreement. Paragraph 8 of the agreement states the hospital commission "has the full authority and responsibility for directing its operations in determining policy, and that it reserves these rights, powers, authorities, duties and responsibilities." See Appendix D at 22(a). Paragraph 9 of the election agreement implicitly recognizes the obvious — the parties are not required to agree. It states:

> If the parties are unable to agree upon a contract after a reasonable period of negotiations and an impasse having been reached, either party may refer any unresolved matters to a fact finder . . . . the fact finder shall . . . make findings of fact and recommend terms of settlement which terms shall be advisory only. See Appendix D, at 23(a).

A fundamental feature of collective bargaining concepts of this particular relationship is that neither party could be compelled to agree to proposals offered by the other. The very nature of collective bargaining as it has evolved in this country is that neither party may be compelled to agree.[9]

That collective bargaining does not require compulsion is a proposition acknowledged in other states, which like Illinois, do not have comprehensive public employee col-

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[9] Section 8(d), National Labor Relations Act, as amended, 28 U.S.C. §158(d); *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960).

lective bargaining laws. *Littleton Education Association* v. *Arapahoe County School District No. 6*, 191 Colo. 411, 533 P.2d. 793 (1976); *Dayton Classroom Teachers Association* v. *Dayton Board of Education*, 41 Ohio St.2d 127, 323 N.E.2d 714 (1975). The dissenting opinion of Justice Simon of the Illinois Supreme Court recognized this principle:

> No terms (of employment) would become effective until the Commission approved them, and the Commission did not have to agree to anything not to its satisfaction. If bargaining broke down, the Commission was free to do as it pleased. 88 Ill.2d at 320; 430 N.E.2d at 1130.

The Illinois Supreme Court has obviously ignored this fundamental principle of collective bargaining in unreasonably construing the election agreement and applying the new statute.

The protection of state or local government discretion is not a sufficient and constitutional reason justifying a contract impairment as distinguished from a modification of a contract remedy. *U. S. Trust Co.* v. *New Jersey, supra*; *Louisiana ex rel. Hubert* v. *New Orleans*, 215 U.S. 170 (1909). The impairment herein is not reasonable because the election agreement provides sufficient protection of governmental discretion and does not require agreement. The Court's sweeping aside of the contract rights does not warrant the traditional deference given by this Court to a state's assessment of reasonableness and necessity. *U.S. Trust Co. of New York* v. *New Jersey*, 431 U.S. at 25-6. This Court has held that a state may not authorize a municipality to borrow money and then restrict indefinitely its taxing power so that the debt cannot be repaid. Such exercise of state discretion is an

obvious violation of the contract clause. *Louisiana ex rel. Hubert* v. *New Orleans, supra. A fortiori,* the Illinois Supreme Court's refusal to enforce the election agreement is an impairment which unconstitutionally and indefinitely postpones the obligations of the contract.

In holding that a public employer could not be ordered to negotiate a collective bargaining agreement, the court failed to distinguish between bargaining *ab initio* and bargaining pursuant to an agreement to recognize and discuss wages, hours and working conditions with an employee representative. This distinction is important to protecting the underlying contract recognition and bargaining rights of petitioners in the instant case, and was recognized by the Illinois Appellate Court, in the instant case, when it held:

> Our ruling in no way interferes with discretionary public policy decisions to be made with regard to this subject area when exercised by the County Board *ab initio.* 91 Ill. App.3d at 1111, 415 N.E.2d at 658.

This is further evidence of the unreasonableness of the Illinois Supreme Court's decision.

The Illinois Supreme Court impairment is also not a necessary exercise of public policy, because a more moderate course of action could have served any of the appropriate policy purposes. In *United States Trust Company* v. *New Jersey, supra,* this Court recognized that a state is not completely free to consider impairing the obligations of its own contract on a par with other policy alternatives, and is not free to impose a drastic impairment when an evident and more moderate course could serve its purposes equally well. 431 U.S. at 31. In the

instant case the Illinois Supreme Court could have enforced the contract recognizing the election agreement's own limitations not requiring agreement or invasion of the county board's discretion. A recognition of a traditional labor law principle that employers may not be compelled to agree as well as the contract's own inherent limitations could have well served the public purpose. Accordingly, the court's total impairment of the contract was unnecessary .

Because the Illinois Supreme Court's decision is not founded upon a fair or reasonable basis, there is no adequate non-federal ground to support it. This Court must inquire whether the state court's decision rests upon a fair or substantial basis. *Broad River Power Co.* v. *South Carolina,* 281 U.S. 537, 540 (1929); *Terre Haute and Indianapolis Railroad Co.* v. *Indiana,* 194 U.S. 579, 589, (1904). The implication that the election agreement delegates responsibility is simply wrong. The election agreement itself provides substantial protection against delegation. The court's decision is so untenable that its application of the County Hospital's Act and refusal to enforce the election agreement is an attempt to decide this case on a non-federal ground, thereby evading this Court's jurisdiction. Even though the constitutional impairment of contract argument was made, the court did not mention it.

CONCLUSION

Free collective bargaining may be created by the employer and employee representatives. Petitioner and the hospital commission attempted nothing more than to establish a fair and democratic system for employee representation and mutual discussions concerning wages, hours and working conditions. The Illinois Supreme Court's application of a statute to impair these contractual rights violates the contract clause and removes from the work place the very essence of democracy which the employees sought to achieve. So long as the employer is not contractually obligated to agree to employee proposals, the election agreement did not detract from management prerogative. The court has, in effect, destroyed collective bargaining for the employees involved. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A

OPINION

SUPREME COURT OF ILLINOIS

United States of America

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* ninth *day of* November *in the year of our Lord, one thousand nine hundred and* eighty-one , *within and for the State of Illinois.*

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE
JUSTICE ROBERT C. UNDERWOOD
JUSTICE HOWARD C. RYAN
JUSTICE THOMAS J. MORAN
JUSTICE DANIEL P. WARD
JUSTICE WILLIAM G. CLARK
JUSTICE SEYMOUR SIMON

TYRONE C. FAHNER, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, *that afterwards, to-wit, on the* 18th *day of* December, 1981 *the opinion of the Court was filed in said cause and entered of record in the words and figures following, to wit:*

Donald Peters, et al.,

Appellees

No. 54544 vs.

Health and Hospitals Governing Commission, et al.,

Appellants

Appeal from Appellate Court First District

CLELL L. WOODS
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS

Docket No. 54544 — Agenda 54 — September 1981.

DONALD PETERS *et al.*,

Appellees,

v.

THE HEALTH AND HOSPITALS GOVERNING COMMISSION *et al.*,

Appellants.

MR. CHIEF JUSTICE GOLDENHERSH delivered the opinion of the court:

Plaintiffs, as officers and representatives of two unions, representing the employees of hospitals under the control of defendant, the board of commissioners of Cook County (Board), brought this action in the circuit court of Cook County against the Board and its members seeking specific performance of two election agreements entered into by the Board's predecessor, the Health and Hospitals Governing Commission of Cook County (Commission). The circuit court allowed defendants' motions to dismiss the actions. Plaintiffs appealed, the appellate court reversed (91 Ill. App. 3d 1104), and we granted leave to appeal. The facts are adequately set forth in the appellate court opinion and will be reviewed here only to the extent necessary to discuss the issues.

In two "election agreements" executed by the Commission and the unions represented by plaintiffs it was agreed that secret-ballot elections would be held to determine whether a majority of the employees in designated units at defendants' hospitals wished to be represented by a union. The first of these agreements was executed in 1971, and apparently several bargaining agreements were subsequently entered into between that union and the Commission. The agreement with the second union was entered into in 1979, and no bargaining agreement was ever entered into as the result of that election. Under the provisions of section 10 of the County

Hospitals Act (Ill. Rev. Stat., 1980 Supp., ch. 34, par. 5020), effective November 30, 1979, the Board took over the operation of the hospitals. Section 10 in pertinent part provides: "[a]ll rights, duties and obligations of the Commission shall become the rights, duties and obligations of the Board of Commissioners."

In reversing the judgments of the circuit court dismissing the actions the appellate court held that the contracts were not terminable at will and that the agreements were enforceable against the Board. It held that the statute transferring jurisdiction over the county hospitals from the Commission to the Board effected the transfer of the Commission's obligations under these election agreements.

This record presents no question of the enforcement of specific contractural provisions concerning wages, hours, conditions of employment, or which disputes may properly be submitted to arbitration. The relief sought by plaintiffs in these actions is that the Board be ordered "to bargain in good faith concerning wages, hours and working conditions" of certain of its employees and "to submit all unresolved negotiation issues to an impartial fact finder." The narrow question presented is whether, because section 10 of the County Hospitals Act provides that the duties and obligations of the Commission shall become the duties and obligations of the Board, the defendants can be required to negotiate in accordance with the prayer of the complaints.

Although much of the appellate court opinion was devoted to determining whether the election agreements were of perpetual duration and therefore terminable at will, or whether they contained ascertainable points of termination, we do not reach these issues. If the agreements are construed to be of perpetual duration, they were terminable at will and defendants were free to terminate them. Assuming, *arguendo*, that the provisions for termination upon the unions' loss of majority repre-

sentation of the employees constituted an ascertainable point of termination so as to preclude construing the agreements to be of perpetual duration, we are of the opinion that the agreements are nevertheless unenforceable.

The agreements imposed upon the Commission only the duty to bargain in good faith. The only intended result of such bargaining is the execution of an agreement covering the compensation, benefits and working conditions of the affected employees. Whether its source is the Constitution (Ill. Const. 1970, art. VII), the Cook County commissioners' act (Ill. Rev. Stat. 1979, ch. 34, par. 909) or the County Hospitals Act, the power to fix compensation, benefits and working conditions requires the exercise of the Board's discretion.

This court has held that a public body may not delegate a discretionary public responsibility with which it is charged. (*Board of Trustees* v. *Cook County College Teachers Union, Local 1600* (1979), 74 Ill. 2d 412; *Board of Trustees* v. *Cook County College Teachers Union, Local 1600* (1976), 62 Ill. 2d 470; *Illinois Education Association* v. *Board of Education* (1975), 62 Ill. 2d 127.) Although the courts have enforced collective bargaining agreements within the scope of those limitations, we find no authority in statutory or case law which supports the position that a public body can be ordered to negotiate such an agreement. Indeed, under the National Labor Relations Act, a State or local governmental entity has the unequivocal right to refuse to enter into a collective bargaining agreement with its employees.

For the reasons stated the judgment of the appellate court is reversed and the judgments of the circuit court are affirmed.

Appellate court reversed;
circuit court affirmed.

MR. JUSTICE SIMON, dissenting:

I dissent for the reasons stated by the appellate court as well as the reasons stated in my dissent in *Board of Education* v. *Chicago Teachers Union, Local 1* (Docket No. 54274, also filed today), and add the following.

The Health and Hospitals Governing Commission, in agreeing to bargain with the unions, did not surrender its discretion to set the terms of employment. No terms would become effective until the Commission approved them, and the Commission did not have to agree to anything not to its satisfaction. If bargaining broke down, the Commission was free to do as it pleased. There was no more delegation of a public duty (here the Commission's duty to exercise discretion to set the terms of employment) than there was in the recent case of *Metropolitan Sanitary District* v. *Village of Romeoville* (1981), 86 Ill. 2d 213. There, this court upheld a contract by which the sanitary district promised to perform Romeoville's legal duty to maintain a bridge. One way for Romeoville to discharge that duty was to have the sanitary district do it for them. If the sanitary district failed to maintain the bridge properly, Romeoville would have to do so itself; the contract did not absolve it of its duty to the public to maintain the bridge; but it was a proper way of arranging a method by which that duty would be fulfilled. Likewise, the hospitals commission's contracts did not divest it of its duty or ability to exercise discretion, but simply established a procedure, collective bargaining, for the preliminary task of generating a proposal. *Littleton Education Association* v. *Arapahoe County School District, No. 6* (1976), 191 Colo. 411, 553 P.2d 793.

The County Hospitals Governing Commission Act provided:

> "The Commission • • • may contract with one or more responsible public or non-profit corporations, hospitals, or health care facilities • • • for the opera-

> tion of any hospital • • • and for the provision of any • • • health • • • services which the county • • • may be required or authorized by law to provide, and the Commission may contract for any other service for the convenience of its operations as it may deem advisable." (Ill. Rev. Stat. 1977, ch. 34, par. 5022.)

In view of this statutory invitation for the Commision to farm out practically all its functions, I believe the undertaking in the contract to bargain collectively with hospital employees, with the Commission retaining ultimate discretion and control, was within the Commission's power and not against public policy. The contract was valid, and the county board, as successor to the hospitals commission, is bound by it under the County Hospitals Act of 1979, which provided a clear transfer of "[a]ll rights, duties and obligations" of the Commission to the Board (Ill. Rev. Stat., 1980 Supp., ch. 34, par. 5020).

ILLINOIS SUPREME COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

Robert H. Gillespy
Clerk

January 29, 1982

Mr. Joel A. D'Alba
Attorney at Law
228 N. LaSalle St., S#1900
Chicago, IL 60601

No. 54544 - Donald Peters, et al., appellees, vs. Health and Hospitals Governing Commission, et al., appellants. Appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for rehearing in the above entitled cause. Certain changes have been made in pages 3 and 4 of the opinion. Please substitute the enclosed pages in the copy of the opinion previously forwarded to you.

Very truly yours,

/s/ Robert H. Gillespy
Clerk of the Supreme Court

APPENDIX B

Second Division
December 22, 1980

80-1448)
80-1629)

DONALD PETERS AND ROBERT SIMPSON, INDIVIDUALLY, AND AS PRESIDENT AND RECORDING SECRETARY, RESPECTIVELY, OF WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES, LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, etc., et al.

Plaintiffs-Appellants,

vs.

HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY, AND ITS SUCCESSOR, BOARD OF COMMISSIONERS, COOK COUNTY, etc., et al.,

Defendants-Appellees,

Appeal From The Circuit Court Of Cook County.
Honorable George A. Higgins, Judge Presiding.

and

DONALD PETERS AND IRVING KURASCH, INDIVIDUALLY, AND AS PRESIDENT AND SECRETARY-TREASURER, RESPECTIVELY, OF HOSPITAL EMPLOYEES LABOR PROGRAM OF METROPOLITAN CHICAGO (H.E.L.P!), etc., et al.,

Plaintiffs-Appellants,

vs.

HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY, AND ITS SUCCESSOR, BOARD OF COMMISSIONERS, COOK COUNTY, etc., et al.,

Defendants-Appellees.

Appeal From The Circuit Court Of Cook County.
Honorable Joseph M. Wosik, Judge Presiding.

MR. JUSTICE HARTMAN delivered the opinion of the court:

In consolidated appeals, plaintiffs, union officers of two different unions and their unions, appeal from dismissal of their separate complaints which sought specific performance of their individual collective bargaining election agreements in actions before two different chancellors in separate proceedings. They identify the issues on appeal as whether an election agreement with a public employer purporting to create collective bargaining obligations, which assertedly terminate upon certain events, can be enforced when neither event has occurred; and, whether a public employer succeeding to the rights, duties and obligations negotiated by its predecessor, another public employer, is obligated to comply with the terms of that collective bargaining agreement. The issues must be determined in the affirmative for the reasons set forth below and the orders of dismissal are reversed.

Plaintiffs in case number 80-1448 are Donald Peters and Robert Simpson, individually, and as president and recording secretary, respectively, of the Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743, International Brotherhood of Teamsters ("Local 743" and, alternatively, "union"). In case number 80-1629 plaintiffs are Donald Peters and Irving Kurasch, individually, and as president and secretary-treasurer, respectively, of the Hospital Employees Labor Program of Metropolitan Chicago ("H.E.L.P!" and, alternatively, "union"). Defendants in each case are Health and Hospitals Governing Commission of Cook County ("Commission") and the Board of Commissioners of Cook County ("County Board").

From the facts set forth in the respective verified complaints, which for the purposes of the motions to dismiss must be deemed true, together with all reasonable inferences which may be drawn therefrom (*Browder* v. *Hanley Dawson Cadillac Co.* (1978), 62 Ill. App. 3d 623, 379 N.E.2d 1206; *Chicago Teachers Union* v. *Board of*

Education of City of Chicago (1973), 14 Ill. App. 3d 154, 301 N.E.2d 833), it appears that on August 6, 1971, Local 743 and the Commission, which had been established in 1969 pursuant to statute (Ill. Rev. Stat. 1969, ch. 34, par. 5011, *et seq.*), signed a collective bargaining agreement providing for an election by secret ballot to determine whether a majority of the Commission's security officers employed at Cook County Hospital chose to be represented by that union. The election was won by Local 743, which since that time has continuously represented those officers for the purpose of negotiating wages, hours and working conditions and administering the collective bargaining agreement. Three consecutive 3-year agreements were so negotiated and administered, the last one expiring in December, 1979 by its own terms.

On November 30, 1979, by statute (Supp. to Ill. Rev. Stat. 1979, ch. 34, par. 5020), the County Board assumed control of and was authorized to exercise all rights, duties and powers which theretofore had been exercised by the Commission. The County Board, however, refused to negotiate with Local 743 with regard to any further collective bargaining agreements. This refusal precipitated the suit for specific performance in number 80-1448, which was filed on March 26, 1980.

In number 80-1629, an election was held pursuant to agreement between the Commission and H.E.L.P! in May, 1979, this time involving the question of whether a majority of the Commission's Cook County and Oak Forest Hospitals' technical employees wished to have H.E.L.P! represent them. The secret ballot election held on June 13, 1979 resulted in H.E.L.P!'s having been so chosen. Between August and November, 1979 the Commission and H.E.L.P! embarked upon negotiations concerning wages, hours and working conditions resulting in agreement to certain items and leaving others for further negotiation. After December 1, 1979, the County Board refused to continue those negotiations, and refused to submit the impasse to arbitration. H.E.L.P! thereafter, on April 2, 1980, filed its complaint for specific performance.

The election agreements in each case provided that if the unions establish through the elections that they represent a majority of the employees covered in each agreement, the Commission will bargain in good faith concerning wages, hours and working conditions, in exchange for the unions' agreements not to strike or permit slowdowns, work stoppages or picketing during any term of such an agreement or pending resolution of collective bargaining negotiations. Where disagreement between the Commission and the unions should ensue after a reasonable period of negotiations, either party is given the right to refer unresolved matters to a fact finder to be selected by the parties or through the American Arbitration Association. The election agreement itself, in each case, thus contains the respective rights and obligations of the parties to negotiate and bargain in good faith for subsequent agreements which would govern the actual wages, hours and work conditions. Neither require that a contract actually be consummated as to these factors. No specific termination date was provided in either election agreement.

Each complaint prayed for specific performance of the agreement therein involved, for an order compelling the County Board to bargain in good faith and to submit unresolved issues to an impartial fact finder. The motions to dismiss filed by the County Board were granted in each case, from which each appeal proceeds, consolidated in this court because of the similarity of the issues to be resolved.

I.

The principal issue centers around the language of the election agreements insofar as they provide, as the unions claim, or fail to provide, as the County Board claims, any recognizable bases for termination. If they do, they may be deemed sufficiently definite to support the proposed actions for specific performance. If not, they may may be regarded as perpetual in duration and, therefore, under Illinois law, terminable at will. (*Joliet*

Bottling Co. v. *Joliet Citizens' Brewing Co.* (1912), 254 Ill. 215, 98 N.E. 263; *Donahue* v. *Rockford Showcase & Fixture Co.* (1967), 87 Ill. App. 2d 47, 230 N.E.2d 278; *Schoen* v. *Caterpillar Tractor Co.* (1968), 103 Ill. App. 2d 197, 243 N.E.2d 31.) An agreement construed by the parties as possessing cognizable events upon which termination may occur, however, is not perpetual and terminable at will and will be upheld even in the absence of a specified termination date. *Consolidated Laboratories, Inc.* v. *Shandon Scientific Co.* (7th Cir. 1969), 413 F.2d 209; *Donahue* v. *Rockford Showcase & Fixture Co., supra; W. P. Iverson & Co.* v. *Dunham Mfg. Co.* (1958), 18 Ill. App. 2d 404, 152 N.E.2d 615.

The unions contend that the agreements' primary obligations to bargain in good faith and refrain from economic actions contain ascertainable termination points upon the occurrence of either of two events: (1) the failure of the parties to comply with an arbitration award; or (2) the unions' loss of status as representatives of majorities of the affected employees.[1] The County Board denies that either of those events constitutes a termination point and claims that no termination event actually exists or can be identified in the election agreements. We disagree.

The County Board's contention is based upon the fact that the termination point of noncompliance with an arbitrator's decision contains within it only an option to terminate the agreement. Therefore, it reasons, an aggrieved party may choose to overlook this refusal to

[1] The majority status could be tested, under the agreements, by employees actions seeking to decertify the unions or by the Commission, if it had objective evidence upon which to question the unions' majority position. The latter action could be sought by the Commission either upon termination of a collective bargaining agreement or one year from the date the union had been certified. If a union lost an election by reason of an employees' or the Commission's action, the obligation to bargain with it would thereby end.

comply with the arbitrator's decision and elect to continue the relationship, thereby preventing this provision from ever operating as an authentic termination event. No authority is cited in support of this proposition. An option to cancel, however, does not necessarily destroy mutuality of obligation or the validity of a contract. (*Peck* v. *Stafford Flower Mills Co.* (8th Cir. 1923), 289 F. 43, 45; *Mayo* v. *American Malting Co.* (4th Cir. 1914), 211 F. 945; *W. P. Iverson & Co.* v. *Dunham Mfg. Co., supra.*) Arguments to the effect that options may never be exercised when breaches occur sink into the same conjectural quicksand as assertions that breaches themselves may never occur. Such speculative assumptions cannot obscure the presence of otherwise ascertainable points of termination, particularly where, as here, the option to cancel is conditioned upon a voluntary act of the other party. 1A Corbin, Contracts, Sec. 165 (1963).

The County Board also disputes the validity of the loss of union majority representation as an ascertainable point of termination, claiming that this is an event over which neither party has any control, citing *Consolidated Laboratories, Inc.* v. *Shandon Scientific Co., supra,* which held that the contract there was not for an indefinite period of time because it was "• • • terminable upon the occurrence of the two specified events, both of which are in the sole control of [the defendants]." (413 F.2d at 212.) From this language, the County Board infers that absent control by either the union or the County Board of the events in the instant contracts, no legitimate termination event is here presented. Control of termination events by either party has not been deemed requisite to the avoidance of terminable at will contract status, however; For example, in *Stein* v. *Isse Koch and Co.* (1953), 350 Ill. App. 171, 112 N.E.2d 491, the terminable event was that plaintiff's discharge from the army, over which neither party had control. In *Donahue* v. *Rockford Showcase & Fixture Co., supra,* the terminable event was the declination of "shipments" generated by the salesman's orders to a level below $25,000 in any one year, which was not controllable by either

party. And in *In the Matter of Commodity Merchants, Inc.* (7th Cir. 1976), 538 F.2d 1260, 1263, the "unsatisfactory financial condition" of a trader's customer was identified as a termination point, determinable by reference to commercial standards. *See, e.g.*, Ill. Rev. Stat. 1975, ch. 26, par. 2-609.

The preceding result would be the same even if it were to be assumed, *arguendo*, that control is a necessity. Union involvement in labor relations is more than simply winning an initial representation election. Such organizations typically must continue their efforts to maintain their majority status by providing adequate representational services during grievance procedures, protesting discharges and presenting persuasive programs with respect to wages, hours and conditions of work. To the extent that a union fulfills, or fails to meet such obligations, it may be argued, as the unions do in this case, that it "controls" its right to continue representation since its failure to do so can result in decertification proceedings under the contracts, which may be initiated by its membership or by the employer. An analogy to such a circumstance can be made to the requirement that a business maintain its existence (*W. P. Iverson & Co.* v. *Dunham Mfg. Co., supra*), or continue to market its products (*Warner-Lambert Pharmaceutical Co.* v. *John J. Reynolds, Inc.* (S.D.N.Y. 1959), 178 F. Supp. 655, *aff'd* (2d Cir. 1960), 280 F.2d 197, and cases therein collected). It is true that the unions, acting rationally in their own best interests, as well as in the interests of those it represents, can be expected to adequately represent its membership just as a business marketing a product upon which it pays royalties can be expected to continue to do so; yet, they may also fail for a number of reasons, including lack of ability, capacity or need, which will result in termination of the contract.

From the foregoing we conclude that refusal to abide by an arbitrator's decision, notwithstanding the option to continue the relationship in the face of such refusal,

and the lack of union majority representation, are sufficiently cognizable termination events so as to remove the contracts involved in the present cases from the indefiniteness characteristic of contracts in perpetuity and terminable at will.

II.

The unions next argue that the obligations of the Commission became the obligations of the County Board, relying upon section 10 of the County Hospitals Act (Supp. to Ill. Rev. Stat. 1979, ch. 34, par. 5020, effective November 30, 1979). That provision, in pertinent part, reads as follows:

> "The Board of Commissioners shall have and exercise all rights, powers and duties heretofore exercised by the Commission. All books, records, papers, documents, property, real and personal, unexpended appropriations and pending business in any way pertaining to the rights, powers and duties of the Commission shall be transferred and delivered to the Board of Commissioners. All rights, duties and obligations of the Commission shall become the rights, duties and obligations of the Board of Commissioners."

Included among the "rights, duties and obligations" assumed by the County Board, it is maintained, are those contained in the collective bargaining election agreements negotiated by the Commission. Because the Commission had the legal authority to enter into such contracts, the unions contend, citing *Tobin* v. *Health and Hospitals Governing Comm'n of Cook County* (1978), 66 Ill. App. 3d 564, 384 N.E.2d 77, which obligated the Commission to bargain in good faith with the unions concerning wages, hours and working conditions, by operation of statute those obligations have been transferred to the County Board. The unions rely upon *People ex rel. Housing Authority of the City of East St. Louis* v. *Hursey* (1956), 7 Ill. 2d 537, 131 N.E.2d 483, and claim the same rights

against the County Board and remedies available to them by reason thereof as they possessed in relation to the Commission.

The County Board counters with the contention that it has the unequivocal right to refuse to enter into collective bargaining agreements with its employees, relying upon section 2(2) of the National Labor Relations Act, as amended (29 U.S.C. sec. 152(2)), *Abood* v. *Detroit Board of Education* (1977), 431 U.S. 209, 52 L. Ed. 2d 26, 97 S. Ct. 1782, and *City of Chicago* v. *Confederation of Police* (1976), 427 U.S. 902, ... L. Ed. 2d ....., 96 S. Ct. 3186. The County Board asserts that to force it to bargain collectively against its decision not to do so is contrary to public policy. It reads *Tobin* v. *Health and Hospitals Governing Comm'n, supra,* as recognizing the County Board's right to exercise its official judgment and discretion in such matters. Since it chooses to exercise that judgment and discretion in this case by refusing to bargain with unions, the County Board maintains that a decision requiring it to do so would be an abridgement of its rights granted to it under its charter. We cannot agree.

The statutory language transferring jurisdiction of County Hospital affairs from the Commission to the County Board is clear, unambiguous and unequivocal. The terms "rights, duties and obligations" to be "transferred and delivered to the Board of Commissioners," require no legalistic gymnastics in order to construe them to include those which emanate from a contract. The supreme court in *People ex rel. Housing Authority* v. *Hursey* construed statutory language requiring the "• • • turn over of all its property and obligations • • •" (Ill. Rev. Stat. 1953, ch. 67½, par. 17(b) (2)) as meaning "[u]nder such circumstances, any person with contract rights against the County Authority [the transferor] would have the same rights against the successor city authority [the transferee], with the same remedial rights and the same property interests and credit supporting the contract." (7 Ill. 2d at 544.) Similarly, by virtue of sec-

tion 10 in the present case, the unions have been given the same contractual rights against the County Board, together with the same remedies, as they would have had against the Commission.

Further, the circumstances presented in this case are little different, with respect to residual rights and obligations, from those presented by a merger of two or more other types of governmental units, in which case the general rule provides that existing contracts and indebtedness of the unit to be annexed become the contracts and indebtedness of the surviving unit, unless otherwise provided by statute. (*People ex rel. Moore* v. *Chicago, B. & Q. R.R.* (1953), 414 Ill. 419, 429, 111 N.E.2d 509; *Kocsis* v. *Chicago Park District* (1935), 362 Ill. 24, 198 N.E. 847.) There is no suggestion in the language of section 10 that the general rule should not be followed in the case at bar. Units of government have been compelled to abide by their contractual obligations notwithstanding public policy discretionary powers which initially might have been exercised in other ways under different circumstances. (*Arlington Heights Nat'l Bank* v. *Village of Arlington Heights* (1966), 33 Ill. 2d 557, 213 N.E.2d 264; *Wall* v. *Chicago Park District* (1941), 378 Ill. 81, 37 N.E.2d 752; *Chalstran* v. *Board of Education of Township High School District* 13 (1910), 244 Ill. 470, 91 N.E. 712.) Our ruling in no way interferes with discretionary public policy decisions to be made with regard to this subject area when exercised by the County Board *ab initio*. *Tobin* v. *Health and Hospitals Governing Comm'n, supra.*

The remaining arguments relative to constitutional prohibitions against impairment of contracts need not be considered in view of the result mandated by the foregoing discussion. The dismissals of the complaints and actions seeking specific performance were in error and must be reversed and remanded for further proceedings consistent with the views herein expressed.

Reversed and remanded.

STAMOS and DOWNING, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
(County) Department Chancery (Division)

DONALD PETERS, LOCAL 743, et al.,
Plaintiffs,

v.

COOK COUNTY BOARD OF COMMISSIONERS,
Defendant.

NO. 80 CH 2047

ORDER

This matter coming on to be heard on defendant's Motion to Dismiss and plaintiffs' Motion for Preliminary Injunction, the motions having been fully briefed, the parties being present and the Court fully advised after oral argument.

THE COURT FINDS, that the recognition-election agreement entered into between the plaintiffs and the Health and Hospitals Governing Commission cannot be enforced against the defendant Cook County Board of Commissioners. Without deciding whether the collective bargaining election agreement is an enforceable contract, this Court FINDS that under existing law, including the County Hospital Act, Ill. Rev. Stat. ch. 34, §5020, the Board of Commissioners of Cook County, as a governing body, cannot be compelled to honor the collective bargaining election agreement.

THE COURT THEREFORE FINDS, that the plaintiffs' motion for preliminary injunction is denied and defendant's motion to dismiss is granted.

/s/ George A. Higgins
Judge

Name: BERNARD, CAREY,
State's Attorney of Cook County

By: John A. Dienner, III Assistant State's Attorney

Attorney for Defendant

Address 500 Richard J. Daley Center

City Chicago, Illinois 60602

Telephone 443-7940

Morgan M. Finely, Clerk Of The Circuit Court
Of Cook County

ENTER: MAY 16, 1980

APPENDIX D

ELECTION AGREEMENT

This Agreement entered into by and between the HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY (hereinafter referred to as the "Commission"), and LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOCAL 46, SERVICE EMPLOYEES INTERNATIONAL UNION (hereinafter referred to as the "Unions"):

1. A secret ballot election will be held to determine whether or not a majority of the employees in the hereinafter described unit at Cook County Hospital (hereinafter referred to as the "Hospital") wish to be represented by a Union. A majority shall be defined as in excess of fifty (50) per cent of the employees eligible to vote; provided that if no Union obtains such a percentage, and fifty (50) per cent of the eligible employees do not vote against such representation, a second election between the two voting alternatives receiving the largest number of votes in the first election will be held, which will be final and binding without any further elections. A majority in the second election shall be defined as in excess of fifty (50) per cent of the employees voting in the election, provided a representative number of employees votes in the election. The Commission and the Unions will each do everything possible to encourage employees in the unit to vote in the election.

2. The unit will be all security officers, but excluding supervisors and all other employees.

3. The election will be administered by Zweiback Enterprises, Inc., 603 Main Street, Evanston, Illinois, which shall be authorized, after consultation with rep-

resentatives of the parties, to finally decide upon all administrative details of the election, such as the number of voting booths required, the color of the ballot to be used in the election (which shall not be made known to the parties until the commencement of the voting), the identification of voters, the number and qualification of observers and similar items. The conduct of the election, and the campaign conduct of the parties with respect to the election which occurs after the execution of this Agreement, shall be governed by the rules and standards applied by the National Labor Relations Board in connection with representation elections conducted by that agency, including the rules and standards for protesting objectionable conduct and irregularities and challenging ballots. Final decisions concerning any disputed aspects of the election, and all disputes concerning objectionable conduct, irregularities and challenged ballots, shall be made by an impartial arbitrator selected by the Commission and the Unions, either by agreement or from a panel of at least seven (7) names to be submitted by the American Arbitration Association. In the event that either party is dissatisfied with all the names appearing on this panel, such party may request forthwith a second panel from which an impartial third party must be chosen. The cost of the election, including the fees of the arbitrator, shall be borne equally by the parties.

4. The election will be held on the Hospital premises on August 11, 1971. Persons eligible to vote shall be all full-time and regular part-time employees within the unit described in paragraph 2 herein, and employed during the payroll period ending July 11, 1971, and who remain and are still employed in the unit on the date of the election. The Commission shall furnish to the Unions, upon execution of this Agreement, an election eligibility list containing the full names and addresses of all eligible voters as last appear on the Commission's records, including an indication of any employees who will be on vacation on the day of the election.

5. If, in the opinion of the arbitrator, it is necessary to do so, he may hold a hearing for the purpose of determining any issues, including objections and challenges, which may arise.

6. Following the counting of ballots and a determination that the election was properly and validly conducted, the arbitrator shall certify the results of the election to the Commission and the Unions. In the event that the arbitrator shall determine that the election was not properly and validly conducted, or that one or both of the parties had engaged in objectionable conduct, the arbitrator is empowered to direct a second election at such time as he may deem appropriate, and the arbitrator shall have the further authority to direct either or both of the parties to give notice to eligible voters of the reasons for the holding of a second election.

7. If such certification demonstrates that all the Unions have lost the election, the Unions and the Commission agree that no further election may be held at the Hospital for two (2) years from the date of such certification of the results of the election; and if the Commission should agree with any other labor organization to conduct an election in a substantially similar bargaining unit, the Unions will be given an opportunity to be placed on the ballot. If such certification demonstrates that a Union has won the election, the parties will proceed forthwith to negotiate in good faith with the Union and enter into a contract covering the terms and conditions of employment for the employees in the unit.

8. The Unions recognize that the Commission has the full authority and responsibility for directing its operations and determining policy, and that it reserves these rights, powers, authorities, duties and responsibilities. By way of example, the Unions therefore agree that should any of them win the election, they will not in any way attempt to interfere with or restrict the Commission's flexibility in deciding to purchase or use its

own personnel, the development of new classifications, the elimination or consolidation of classifications, the use and development of new methods, procedures, or equipment, the assignment and direction of personnel, the training of personnel and similar matters. The Unions also recognize that this Agreement does not empower the Commission to do anything that it is prohibited from doing by law, and that the Commission is not obligated to provide any economic benefits or comply with the related provisions of any subsequently arrived at contract in the absence of an applicable appropriation by the Board of Commissioners of Cook County.

9. If the parties are unable to agree upon a contract after a reasonable period of negotiations and an impasse having been reached, either party may refer any unresolved matters to a fact-finder to be selected by agreement of the parties or through the American Arbitration Association in accordance with its rules. The fact-finder shall meet with the parties, hold hearings and make findings of fact and recommend terms of settlement, which terms shall be advisory only. The fact-finder's report shall be submitted in writing to the parties, and the fact-finder shall decide whether it is to be released to the public. The cost of such proceeding shall be shared equally by the parties.

10. The Unions agree that there will be no work stoppages, strikes, slowdowns or picketing of any kind at the Hospital, or for any reason, pending fact-finding as provided in paragraph 9 hereof. The Commission agrees that there will be no lockouts pending fact-finding as provided in paragraph 9 hereof.

11. The Unions agree that should any of them win the election, any contract arrived at between the Commission and the Union at any time in the future will contain a provision prohibiting work stoppages, strikes, slowdowns, or picketing of any kind or for any reason at the Hospital (including the honoring of other unions' picket lines) during the term of the contracts. The contract

shall further provide that all disputes arising out of the terms and conditions of such contract shall be submitted to an impartial arbitrator to whom all of the facts will be presented, and whose award with respect to such matters will be final and binding upon both parties to the extent permitted by law and within the power and authority of the Commission. Such arbitrator shall be selected by agreement or from a panel of at least seven (7) names submitted by the American Arbitration Association. In the event that either party is dissatisfied with the names appearing on such panel, such parties may request a second panel, from which an impartial arbitrator must be chosen. The arbitrator thus selected shall have no authority to vary the terms of any contract. The fees and expenses of the arbitrator shall be borne equally by the parties. Such contract will also provide that any and all employees actually engaging in any work stoppage, strike, slowdown or picketing in violation of these prohibitions may be suspended or discharged at the discretion of the Commission, and that there can be no resort by the employee(s) or the Union, as a result of such suspension or discharge, to any grievance or arbitration procedure, except with respect to the question of whether or not the employee(s) shall have engaged in the prohibited conduct. Nothing in this Agreement shall be construed so as either to interfere with or impede or diminish in any way work stoppages, strikes, slowdowns or picketing upon the termination of any collective bargaining agreement, provided that the Union shall give at least ten (10) days' written notice of any such economic action to be taken at the termination of any contract.

12. The Commission agrees that should any Union win the election, any contract arrived at between the Commission and the Union at any time in the future will contain a provision prohibiting lockouts of any kind or for any reason at the Hospital, and further providing that all disputes shall be resolved by arbitration in the manner set forth in paragraph 11 hereof.

13. The arbitrator provided for in paragraph 11 hereof shall have the authority to enjoin any work stoppage, strike, slowdown, picketing or lockout, and shall have the authority to order specific performance of any such provision in any contract between the parties hereto: [*and* any and every such contract between the Commission and the Union shall so provide.] In the event of a work stoppage, strike, slowdown or picketing, the Commission may pursue any legal or equitable remedy otherwise available in lieu of or in addition to arbitration, and it will not be a condition precedent to pursuit of any judicial remedy that any grievance or arbitration procedures be first exhausted.

14. All disputes concerning the interpretation, application or violation of this Agreement also shall be immediately submitted to arbitration as provided in paragraph 11 hereof. If the arbitrator finds that a violation of this Agreement has occurred, he shall determine the method and time within which the violating party must attain compliance with the provisions of this Agreement. If the violating party does not attain compliance thereafter in accordance with such determination of the arbitrator, the other party shall have the option of declaring this entire Agreement null and void, thereby terminating any existing relationship between the parties.

15. If a Union wins the election, the Commission may question the continuing status of the Union as the representative of a majority of the employees in the unit, or employees may seek to decertify the Union, upon the termination of any subsequent contract between the parties, or one (1) year from the date of certification of the Union, whichever is longer. The Commission, however, may seek a new election hereunder only if it has objective evidence to question the Union's majority status, as required by the National Labor Relations Board. In such an event, the arbitrator shall direct an election to be conducted in substantially the same manner and under substantially the same terms and conditions as provided

for in the case of the election provided for at this time, and the consequences provided in this Agreement between the parties with respect to the results of that election shall be applicable with respect to the election herein provided for.

WHEREFORE, the parties have signed this Agreement on the 6 day of August, 1971.

Health And Hospitals Governing Commission Of Cook County

By /s/ .....
Associate Director of Industrial Relations

Local 743, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers Of America

By /s/ .....
Trustee and Director of Organizing

Local 46, Service Employees International Union

By /s/ .....
President

APPENDIX E

REVIEW OF STATE STATUTES PROVIDING FOR COLLECTIVE BARGAINING

Alaska:
Alaska Stat. §§ 14.20.056(a), 23.40.100(b);

California:
Cal. Gov't Code §§ 3573, 3507, 3520.5, 3544 (Deering);

Connecticut:
Conn. Gen. Stat. Ann. §§ 5-271(b), 7-468(b), 10-153(b)(e) (West);

Delaware:
Del. Code Ann. tit. 10 § 1306, 14 § 4004;

District of Columbia:
D.C. Code Ann. § 1-610.10

Florida:
Fla. Stat. Ann. § 447.307 (West);

Georgia:
Ga. Code Ann. § 54-1304;

Hawaii:
Hawaii Rev. Stat. § 89-8

Idaho:
Idaho Code §§ 33-1273, 44-1803

Indiana:
Ind. Code § 20-7.5-1-10 (West)

Iowa:
Iowa Code Ann. §§ 20.14-20.15 (West)

Kansas:
Kan. Stat. Ann. §§ 72-5415, 75-4327;

Kentucky:
Ky. Rev. Stat. Ann. § 345.030 (Baldwin)

Louisiana:
La. Rev. Stat. Ann. § 23:890D (West)

Maine:
Me. Rev. Stat. Ann. tit's 26 §§ 967, 979-F, 1025;

Maryland:
Md. Educ. Code Ann. § 6-407
Baltimore City Code Art. I § 115

Massachusetts:
Mass. Ann. Laws Chap. 150E § 4 (Michie/Law Co-op)

Michigan:
Mich. Stat. Ann. § 17.455 (11)

Minnesota:
Minn. Stat. Ann. § 179.65 (West)

Missouri:
Mo. Ann. Stat. §§ 105.510, 105.520 (Vernon)

Montana:
Mont. Code Ann. §§ 39-31-208, 39-32-107

Nevada:
Nev. Rev. Stat. § 288.160

New Hampshire:
N.H. Rev. Stat. Ann. § 273-A:10

New Jersey:
N. J. Rev. Stat. Ann. § 34:13A.5.3 (West)

North Dakota:
N.D. Cent. Code § 15-38.1-11

Oklahoma:
Okla. Stat. Ann. tit. 11 § 51-103 (West)
tit. 70 § 509.2 (West)

Oregon:
Or. Rev. Stat. § 243.666

Pennsylvania:
Pa. Stat. Ann. tit. 43 § 1101.606 (Purdon)

Rhode Island:
R.I. Gen. Laws §§ 36-11-1; 28-9.4-4; 28-9.3-3; 28-9.1-5;
" " " " 28-9.2-5; 28-9.5-5;

South Dakota:
S. D. Codified Laws Ann. § 3-18-3

Texas:
Tex. Civil Stat. Labor § 5154c-1 (Vernon)

Tennessee:
Tenn. Code Ann. § 49-5504

Utah:
Utah Code Ann. § 34-20a-4

Vermont:
Vt. Stat. Ann. tit. 21 §§ 1583, 1723, 1724
" " " tit. 16 § 1991

Washington:
Wash. Rev. Code Ann. §§ 41.56.080, 41.59.090, 28B.100 (11), 28B.52.030

Wisconsin:
Wis. Stat. Ann. § 111.83 (West); § 111.70

Wyoming:
Wyo. Stat. § 27-10-104

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In the Supreme Court of the United States

October Term, 1981

DONALD PETERS, ROBERT T. SIMPSON, JR., WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES, LOCAL 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Petitioners,

vs.

HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Illinois Supreme Court's holding that the power of the Board of Commissioners of Cook County to

fix compensation, benefits, and working conditions for petitioners employed at Cook County Hospital is a non-delegable discretionary public responsibility constitutes a sufficient independent basis in state law so as to preclude review by this Court.

PROVISIONS INVOLVED

Two of the statutes involved below are set forth in the Petition. In addition, the Cook County Commissioner's Act, Ill. Rev. Stat. 1979, ch. 34, §909, provides:

> Said board of commissioners shall have the management of the affairs of said Cook County, in the manner provided by law, and may exercise the same powers, perform the same duties, and shall be subject to the same rules, regulations and penalties prescribed by law for the board of supervisors in other counties, except as herein otherwise provided; and shall also be subject to the rules, regulations and restrictions herein provided.

The Constitution of the State of Illinois, Article VII, Section 6, provides:

(a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

(b) A home rule unit by referendum may elect not to be a home rule unit.

(c) If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail with its jurisdiction.

(d) A home rule unit does not have the power (1) to incur debt payable from ad valorem property tax receipts maturing more than 40 years from the time it is incurred or (2) to define and provide for the punishment of a felony.

(e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, except that the form of government of Cook County shall be subject to the provisions of Section 3 of this Article. A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise approved by law. A home rule county shall have the power to provide for its officers, their manner of selection and terms of office in the manner set forth in Section 4 of this Article.

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (1) of this section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (1) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the

concurrent exercise or specifically declare the State's exercise to be exclusive.

(j) The General Assembly may limit by law the amount of debt which home rule counties may incur and may limit by law approved by three-fifths of the members elected to each house the amount of debt, other than debt payable from ad valorem property tax receipts, which home rule municipalities may incur.

(k) The General Assembly may limit by law the amount and require referendum approval of debt to be incurred by home rule municipalities, payable from ad valorem property tax receipts, only in excess of the following percentages of the assessed value of its taxable property: (1) if its population is 500,000 or more, an aggregate of three percent; (2) if its population is more than 25,000 and less than 500,000, an aggregate of one percent; and (3) if its population is 25,000 or less, an aggregate of one-half percent. Indebtedness which is outstanding on the effective date of this Constitution or which is thereafter approved by referendum or assumed from another unit of local government shall not be included in the foregoing percentage amounts.

(l) The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

(m) Powers and functions of home rule units shall be construed liberally.

STATEMENT OF FACTS

The Respondent is the Cook County Board of Commissioners (hereinafter, Board), the successor in interest to the Health and Hospitals Governing Commission (hereinafter, Commission).

Prior to July 1969, Cook County Hospital, Oak Forest Hospital, and their allied facilities were under the direction and control of the County of Cook. After that time, the legislatively created Health and Hospitals Governing Commission of Cook County assumed total control of those facilities and held sway for just over ten years. It is a matter of public record that general dissatisfaction with the Commission arose early in its history and finally increased in intensity to the point that the General Assembly, responding to the allegations of gross fiscal mismanagement, abolished the Commission. The commission had managed to amass, in its brief ten year history, a staggering $80-90,000,000 budget deficit.

The alternatives available to the Legislature and the County were to close the facilities for lack of funds or to allow the County an opportunity to drastically trim the costs of running the hospitals in hope of keeping their services available to the medically indigent citizens of the greater Chicago metropolitan area. The second alternative, of course, is the alternative which was selected. The tottering hospital system returned to the control of Cook County through its Board of Commissioners.

During the Commission's existence, it entered into at least seven "union recognition agreements." These agreements purported to obligate the Commission to negotiate with labor unions and sign a continuing series of collective bargaining agreements. These agreements were signed with such diverse groups as the House Staff (doc-

tors in post graduate training) and the Security Staff. Several of these collective bargaining agreements were renegotiated two and three times between 1969 and 1979. Typically, the contracts were for three year periods.

When the County resumed control of the hospital system it recognized those agreements still in effect but announced that it would not enter into new collective bargaining agreements in the future. The County has never collectively bargained with its employees and stated to the Petitioners that it did not intend to do so in the future.

Consequently, three lawsuits were brought in the Circuit Court of Cook County by unions seeking to coerce the County to bargain with them for new contracts (the old ones having expired by their own terms): *Peters* v. *Governing Commission*, 80 CH 2047 (security staff); *Peter* v. *Governing Commission*, 80 CH 2147 (clerical staff); and *House Staff Association* v. *County of Cook*, 80 CH 2335 (house staff). Circuit Judges George A. Higgins, Joseph A. Wosik and Richard M. Curry, respectively, heard those matters and separately concluded that the County's Motions To Dismiss should be granted for the reasons that the "recognition agreements" were terminable at the will of either party for the want of a termination date and that the County of Cook had the inherent authority to exercise its discretion to refuse to bargain with its employees. The trial courts did not reach the federal constitutional issue of impairment of contracts. The first two cases were appealed and consolidated for hearing before the Illinois Appellate Court and Supreme Court. The third case was never appealed.

The Illinois Appellate Court concluded that a termination point existed and therefore the contract was not terminable at will and that the language of the County Hospitals Act clearly requires the Board to assume the Commission's "obligations" to bargain collectively with

its employees despite its "public policy discretionary powers which initially might have been exercised in other ways under different circumstances." Thus, the appellate court found it unnecessary to reach the federal constitutional impairment of contracts agrument raised by petitioners.

The Illinois Supreme Court concluded that the Board had inherent discretion to refuse to enter into collective bargaining agreements with its employees and affirmed the trial court's dismissal of Petitioner's complaints. Like the decisions below, it did not reach Petitioner's constitutional issue. It is this decision which petitioners seek to have this Court review by certiorari.

ARGUMENT

THE ILLINOIS SUPREME COURT'S HOLDING THAT THE POWER OF THE BOARD OF COMMISSIONERS OF COOK COUNTY TO FIX COMPENSATION, BENEFITS, AND WORKING CONDITIONS AT COOK COUNTY HOSPITAL IS A NON-DELEGABLE DISCRETIONARY PUBLIC RESPONSIBILITY CONSTITUTES A SUFFICIENT INDEPENDENT BASIS IN STATE LAW SO AS TO PRECLUDE PREVIEW BY THIS COURT.

Petitioners contend that this Court has jurisdiction to review the Illinois Supreme Court's decision because the County Hospital's Act has been applied in a manner that impairs the collective bargaining agreement. Respondent submits that this is an erroneous interpretation of the opinion of the Illinois Supreme Court.

Where the decision of the state court is based upon an adequate nonfederal ground, review will be declined by this Court. *Wood* v. *Chesborough*, 228 U.S. 672 (1913); *West Chicago Street Railway Co.*, v. *Illinois, ex rel., Chicago*, 201 U.S. 506 (1906); *Chicago B. & Q. R. Co.,v Illinois ex rel., Com'rs.*, 200 U.S. 561 (1906).

Neither the Illinois Supreme Court nor the appellate court reached petitioner's federal constitutional impairment of contract argument. Both courts decided this case on state law grounds. Although the greater part of the appellate court opinion was concerned with whether the collective bargaining agreements were of perpetual duration and therefore terminable at will, the Illinois Supreme Court never even reached this issue. The supreme court held as a matter of state law that a public body may not delegate a discretionary public responsibility with which it is charged. Without embarking on a lengthy discussion of this issue, suffice it to say that the adequacy of this state law

basis is demonstrated by the cases cited in the supreme court opinion.

Even if the state law basis supporting the discretionary powers argument was inadequate, there remains yet a second adequate state law basis to support the supreme court opinion.

Illinois law is clear that contracts which have no specified term, are terminable at the will of either party. *P.S. & E., Inc.* v. *Selastomer Detroit, Inc.*, 470 F.2d 125 (7th Cir. 1973) citing, *Joliet Bottling Co.*, v. *Joliet Citizens Brewing Co.*, 254 Ill. 215 (1912), and *Schoen* v. *Caterpiller Tractor Co.*, 103 Ill. App. 2d 197 (1968); *First Mission Covenant Church* v. *Rockford Broadcasters, Inc.*, 324 Ill. App. 8 (1944); *Stein* v. *Isse Koch & Co.*, 350 Ill. App. 171 (1953); *Orr* v. *Ward*, 73 Ill. 318; *Morey* v. *Hoffman*, 12 Ill. 2d 125 (1957); *Gage* v. *Village of Wilmette*, 233 Ill. App. 20 *aff'd* 315 Ill. 328; *Adkisson* v. *Ozment*, 55 Ill. App. 3d 108 (1977); *Steinberg* v. *Keepper-Nagel Real Estate*, 14 Ill. App. 3d 619 (1973); *Kraftco Corp.* v. *Koblus*, 1 Ill. App. 3d 635 (1971) and the recently decided case of *Uptown People's Community Health Services* v. *Board of Commissioners of Cook County*, 647 F.2d 727 (7th Cir. 1981).

The petitioners assert that the agreements could be terminated by the Commission if the unions ever lose their majority status, (paragraph 15 of the election agreements, attached as Appendix C of the Petition) or in the event of a party's failure to abide by an arbitrator's ruling. These do not constitute legally cognizable termination points. Many Illinois cases make that point obvious. The first is *Steinberg* v. *Keepper-Nagel Real Estate Investments, Inc., supra.* A real estate sales contract was signed requiring the purchaser to undertake, at its own expense, a rezoning effort within 180 days of the lifting of the Village's apartment rezoning moratorium. The moratorium was not lifted

for three years and the plaintiff-seller filed suit to declare the contract terminated.

There, as here, the contract was executory. That is to say, it required future performances. The Court found that the only time limit for performance mentioned within the contract was the 180 days after the lifting of the moratorium. The Court held,

> "Thus, it is clear that the contract did not express any time limit for its performance.
>
> * * *
>
> Where no definite time is fixed during which an executory contract shall continue in force, it is terminable at the will of either party . . ." [at p. 622]

The *Steinberg* court rejected the purchaser's arguments which are similar to the petitioners' herein: to wit, an indefinite future event is a sufficient termination point. As in *Steinberg*, time had passed since the signing of many of these election agreements and there is no prospect that the condition of loss of majority status will occur in the foreseeable future.

The next case which makes the same point is the *Uptown Community Health Services Board* v. *Board of Commissioners of Cook County, supra.* That case also involved an agreement between the now defunct Hospital Commission and a community group. That management agreement had no termination date and was not for a term of years. Language in the agreement stated that the Commission will provide funding until "economic self-sufficiency" of the clinic is achieved. It had not been achieved at the time the suit was filed.

The United States Court of Appeals for the Seventh Circuit, applying Illinois law, held that the purported contract was executory and was subject to termination at the will of

either party. In this case the Commission had specifically acted to end the agreement unilaterally. The court found that to have been legally done. In the case at bar the County of Cook, successor in interest to the Commission, acted to terminate the "election agreements" by sending written notices to the unions. That legally terminated the executory contracts in question.

There is little room for debate that the "election agreements" in question are executory. They purport to obligate the County to negotiate a continuing series of contracts. Even if the parties were now to negotiate a new three year contract, that would not cause the "election agreement" to be executed. The agreement can never be executed by negotiating collective bargaining agreements whether they be one in number or many. In that sense they are unquestionably perpetual in nature and therefore terminable at the will of either party.

The petitioners and the Illinois Appellate Court relied heavily upon the case of *Stein* v. *Isse Koch and Co., supra,* as authority for the proposition that uncertain events can constitute a termination point. Stein's date of discharge from the Army was said to be uncertain. That is true up to a point. What is overlooked is that the contract's maximum duration was known to al parties at the time of its making. Stein would be required by federal law to leave the Army no later than when he reaches mandatory retirement age. His mustering-out date was not exactly known but a specific point was known beyond which it could not extend. The conditions at bar could be months, years, or generations from now. It has limitless potential life.

There is no question that the "election agreements" are executory to the extent they oblige the County of Cook to enter into future collective bargaining agreements. *Kraftco*

Corp., v. *Koblus, supra*, summarizes the current state of the law.

> "It has long been the holding of the Illinois Courts that where an executory contract fixes no time for its operation, it is terminable at the will of either party." [at p. 640]

Thus, it is clear that there are two adequate bases in state law for the decision of the Illinois Supreme Court in this case. Consequently, this Court should decline to review this case.

Although petitioners also contend that the subsequently enacted County Hospitals Act, Supp. to Ill. Rev. Stat. 1979, ch. 34, §5020, has been applied by the Illinois Supreme Court in a manner which results in an unconstitutional impairment of petitioners' pre-existing collective bargaining agreement, a careful look at the Illinois Supreme Court's opinion clearly discloses the misinterpretation inherent in that argument. The Illinois Supreme Court stated:

> Whether its source is the Constitution (Ill. Const. 1970, art. VII), the Cook County commissioners' act (Ill. Rev. Stat. 1979, ch. 34, §909) or the County Hospitals Act, the power to fix compensation, benefits and working conditions requires the exercise of the Board's discretion.

Any one of these three sources of the Board's discretionary powers are, on an individual basis, sufficient to support the decision in this case. When all are considered together it becomes clear that two of these sources of authority do not fall into the category of subsequently enacted statutes which could have impaired petitioners' collective bargaining agreements.

CONCLUSION

For the foregoing reasons the respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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There Are No Adequate Non-Federal Grounds Supporting The Illinois Supreme Court's Decision

Respondent asserts the Illinois Supreme Court decision is supported by two adequate non-federal grounds, to wit, the bar on the delegation of discretionary public responsibility and the right to terminate the collective bargaining election agreement at will. The former is not

a tenable basis upon which to deny enforcement of the collective bargaining election agreement; the latter is not the law of the case. The Illinois Supreme Court specifically stated that it was not ruling upon that issue, thereby leaving the Illinois Appellate Court's determination intact.

Discretionary public responsibility of the Respondent has not been delegated by the collective bargaining election agreement. The agreement does not require either party in the negotiations to agree upon the proposals submitted by the other, and it does not delegate any public responsibility to the union. Rather, the agreement recognizes the respondent's right to direct its operations and to determine its policy. As long as neither party may be compelled to agree, discretionary policy making is controlled by the respondent. This point was acknowledged by the Illinois Appellate Court. Thus, neither the agreement or its collective bargaining obligation interferes with respondent's policy making role.

The cases relied upon by the state court and respondent, *Board of Trustees* v. *Cook County College Teachers Union, Local 1600,* 74 Ill.2d 412, (1979); 386 N.E.2d 47; *Board of Trustees* v. *Cook County College Teachers Union, Local 1600,* 62 Ill.2d 470, 343 N.E.2d 473 (1976); *Illinois Education Association* v. *Board of Education,* 62 Ill. 2d 127, 340 N.E.2d 7 (1975), involve the improper delegation of authority to labor arbitrators to issue final and binding interpretations of collective bargaining agreements. In such matters as teacher terminations. These decisions do not mean that negotiations themselves constitute a delegation of discretionary public responsibility. In the absence of a requirement to agree, there is simply no such delegation.

Because the court's decision is not based upon a proper analysis of the collective bargaining election agreement and negotiations obligations, the asserted non-federal ground is plainly untenable. Review by this court is warranted to assure that the constitutional mandate against contract impairment is not evaded by a state court decision which only facially purports to avoid the issue. *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938); *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine* v. *Michaux*, 279 U.S. 737, 744-45 (1929); *Columbia Railway Gas and Electric Co.* v. *South Carolina*, 261 U.S. 236, 247 (1923); *Hartford Life Insurance Co.* v. *Barber*, 245 U.S. 146 (1917); *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 247 (1916); *Ward* v. *Love County*, 253 U.S. 17 (1920). See also *Petition For Writ of Certiorari*, at 11-17.

Alternatively, the delegation of discretionary responsibility ground is not sufficiently independent and broad enough to support the state court's decision because it is interwoven into the contract impairment issue. *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U.S. 158, 160 (1933); *Creswill* v. *Grand Lodge Knights of Pythias of Georgia*, 225 U.S. 246 (1912). Intrensic to the Illinois Supreme Court's refusal to transfer the contract provisions and enforce them is its untenable believe that discretionary responsibility would be delegated. The federal issue of contract impairment is thus based upon the court's delegation of discretionary ground. The issue is simply too tightly tied to the contract impairment problem to be sufficiently independent. The connection between delegation and contract impairment issues is siimlar to the interweaving of a state court's resolution of taxable situs for property with due process of law-taxation-claims.

See generally, *Johnson Oil Refining Co.* v. *Oklahoma, supra.* In *Johnson Oil,* this Court examined the Oklahoma Supreme Court's decision applying an *ad valorem* tax on an entire fleet of railroad tank cars which were not always located within the state. This court asserted jurisdiction because the federal right turned on a determination of situs. Therefore, the delegation issue is not sufficiently independent or broad to be an adequate non-federal ground.

Respondent's assertion of a second non-federal ground based upon the "terminable at will" doctrine is not supported by the Illinois Supreme Court's decision. That court did not specifically decide that the collective bargaining election agreement is terminable at will. The court assumed that the contract contains an ascertainable point of termination, but held it to be unenforceable. The Illinois Appellate Court exhaustively considered the issue and held the contract not to be terminable at will because it contains ascertainable points of termination based upon the union's decertification (loss of majority status) and either party's refusal to honor an arbitration award. See Appendix B, *Petition For Writ of Certiorari,* at 11A-15A. Because the Illinois Supreme Court did not base its decision upon the terminable at will doctrine, and did not overrule the decision of the Illinois Appellate Court, the terminable at will doctrine cannot be advanced as a basis upon which to defeat this Court's jurisdiction.

The County Hospitals Act Is The Subsequently Enacted Statute Which Impaired The Contract

The Illinois Supreme Court specifically stated:

> The narrow question presented is whether, because section 10 of the County Hospitals Act provides that the duties and obligations of the Commission shall become the duties and obligations of the Board, the defendants can be required to negotiate in accordance with the prayer of the complaints. *Peters, et al* v. *Health and Hospitals Governing Commission of Cook County*, 88 Ill. 2d 316, 318 430 N.E.2d 1128, 1130 (1981).

There is no doubt that the transferring provision of the County Hospitals Act, contained in section 10, was the only statute interpreted below. Section 10 is reprinted at page 3 of the *Petition For Writ of Certiorari.*

Respondent is, therefore, incorrect in its assertion that the County Hospitals Act is only one of three sources of authority upon which the court based its decision. The court clearly stated the County Hospitals Act is the basis of the question presented. The Board of Commissioners could not have asserted authority over the employees covered by the collective bargaining election agreement without the passage of the County Hospitals Act. The state court's application of this act to the election agreement constitutes an unconstitutional impairment. The court obviously answered its narrowly framed question in the negative by holding that the election agreement does not transfer as an obligation pursuant to section 10 of the act.

CONCLUSION

There are simply no adequate non-federal grounds to support the decision of the Illinois Supreme Court which applied a subsequently enacted law to impair the collective bargaining agreement, and certiorari should be granted.

Respectfully submitted,

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